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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

MARY LAMB-BOWMAN

Petitioner,

v.

DELAWARE STATE UNIVERSITY

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For
The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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September 26, 2002

71 pp

QUESTIONS PRESENTED

1. Can an employer, who is a federally funded educational institution, escape liability for unlawful sex discrimination and retaliation against an employee on claims that include allegations that are relevant and actionable under Title IX, simply because an employee, who has met all the requirements, deadlines and limitations of Title VII, is proceeding exclusively under Title VII of the Civil Rights Act of 1964 and not Title IX of the Educational Amendments of 1972?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

REASONS FOR GRANTING THE WRIT 8

1. The Third Circuit Decision Below Conflicts With Decisions of Other Courts Of Appeals As to The Proper Relationship And Interpretation of Title VII Of The Civil Rights Act of 1964, 42 U.S.C. § 2000e And Title IX Of The Educational Amendments Of 1972, 20 U.S.C. § 1681 8

2. Third Circuit's Misapprehended The Scope Of Title VII In Ruling On Lamb-Bowman's Sex Discrimination Claim 10

3. Third Circuit's Misapprehended The Scope Of Title VII In Ruling On Lamb-Bowman's Retaliation Claim 18

Conclusion 30

Appendix A . . . . . App. 1

Appendix B . . . . . App. 25

Appendix C . . . . . App. 26

Appendix D . . . . . App. 32

TABLE OF AUTHORITIES

Cases	Page(s)
Aman v. Cort Furniture Rental Corp. 85 F.3d 1074,1085(3rd Cir. 1996)	17
Anderson v. Liberty Lobby, Inc. 477 U.S. 249 (1986)	13
Aviles v. Cornell Forge Company 183 F.3d (7th Cir.1999)	22
Brock v. Richardson 812 F.2d 121(3rd Cir. 1987)	28
Charlton v. Paramus Board of Education 25 F.3d 194, 201 (3rd Cir.1994)	25
Harris v. Forklift Systems, Inc. 510 U.S. 17, 21 (1993)	16
Hishon v. King & Spalding 467 U.S. 69, 74 (1984)	16, 21
Johnson v. Railway Express Agency 421 U.S. 454, 459 (1975)	12
Lakoski v. James 66 F.3d 751(5th Cir.1995)	passim
Lamb-Bowman v. Delaware State University 1999 U.S. Dist. LEXIS 19648 (D. Del. December 10, 1999)	4

Cases **Page(s)**

Lambert v. Ackerley
180 F.3d 997(9th Cir. 1999) 28

Lipsett v. University of Puerto Rico
864 F.2d 881,897 (1st Cir.1988) 9

McDonnell Douglas v. Green
supra at 802 n.13 ..... 19, 21

Meritor Savings Bank, FSB v. Vinson
477 U.S. 57 (1986) 17

Mitchell v. Robert DeMario Jewelry, Inc.
361 U.S. 288, 292-93 (1960) 28

Nelson v. Upsala College
51 F.3d 383, 387 (3rd Cir. 1995) 25

Passaic Valley Sewerage Commissioner
v. United States Department of Labor
992 F.2d 474 (3rd Cir.1993) 29

Preston v. Commonwealth of Va.
31 F.3d 203,206(4th Cir.1994) 9

Reeves v. Sanderson Plumbing Products, Inc.
___ U.S. ___,120 S. Ct. 2097, 2110 (2000) 13, 23

Roberts v. Colorado State Bd. Of Agric.
998 F.2d 824,832
(10th Cir.), cert. denied, 510 U.S. 1004 (1993) 9

Cases **Page(s)**

Tennessee Coal, Iron & R.Co. v.
Muscoda Local No.123
321 U.S. 590(1944) 28

United States Postal Service Board
of Governors v. Aikens
460 U.S. 711, 714 (1983) 19

Woodson v. Scott Paper Co.
109 F.3d 913, 919 (3rd Cir. 1997) 21, 26

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PETITION FOR WRIT OF CERTIORARI

The petitioner Mary Lamb-Bowman respectfully prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 28, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unpublished and appears in Appendix C hereto. The opinion of the United States District Court for the District of Delaware is published at 152 F.Supp.2d 553(D.Del.2001) and appears at Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 28, 2002 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The federal statutes involved are Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e *et seq.*, and Title IX of the Educational Amendments of 1972, 20 U.S.C. §1681 et seq.

STATEMENT OF THE CASE

Petitioner Lamb-Bowman filed an action in the United States District Court for the District of Delaware on November

28, 1998, complaining of unlawful employment discrimination and retaliation when she was terminated as both Head Women's Basketball Coach and Senior Women's Administrator[1] in the athletic department at Delaware State University. Prior to filing her lawsuit, Petitioner filed a complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and received a notice of right to sue. Because of the ruling of the Fifth Circuit in Lakoski v. James, 66 F.3d 751(5th Cir.1995)(holding, among other things, that there is no private right of action for employment discrimination under Title IX), Petitioner waited until she was issued a notice of right to sue on her Title VII claims before filing her lawsuit in federal court. The District Court for the District of Delaware determined that Petitioner's non-Title VII claims were time-barred and that Petitioner could

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[1]As Senior Women's Administrator, Lamb-Bowman was the highest ranking female employee in the athletic department and it was Petitioner's responsibility as the Senior Women's Administrator to advocate for the interests of the women students and employees in the athletic department of Delaware State University.

proceed in court only on her Title VII claims. See, Lamb-Bowman v. Delaware State University, 1999 U.S.Dist.LEXIS 19648(D.Del.December 10, 1999). After the completion of discovery, Delaware State filed a motion for summary judgment seeking to dismiss Petitioner's retaliation claim under Title VII only. However, the District Court in its ruling on Delaware State's motion for summary judgment on Lamb-Bowman's Title VII retaliation claim, issued summary judgment in favor of Delaware State on Lamb-Bowman's Title VII sex discrimination claims as well. On appeal, the Third Circuit affirmed the District Court because it found Petitioner's sex discrimination and retaliation claims actionable against her employer under Title IX but not Title VII. Appendix 29-30.

STATEMENT OF FACTS

Petitioner Mary Lamb-Bowman began her employment with the Delaware State University ("DSU") in 1985 as the Head Women's Basketball Coach and Head Women's Volleyball Coach. She performed in both positions until 1993.

Beginning in July, 1993 until she was terminated in August, 1995, Lamb-Bowman held the positions of Head Women's Basketball Coach and Senior Women's Administrator. Lamb-Bowman was terminated from both positions in August, 1995. However, during the summer of 1994, John Martin, who was then the Athletic Director of DSU, placed falsified personnel records and documents concerning Lamb-Bowman's performance into her personnel file that he never showed or discussed with her in order to falsely establish a basis for terminating Lamb-Bowman's long term employment with DSU. Mr. Martin submitted this falsified document into Lamb-Bowman's personnel file in order to mislead his supervisor, Gladys Motley, concerning Lamb-Bowman's performance and to create a false impression that Lamb-Bowman had consented to a sham terminal contract with DSU. William DeLauder, President of DSU, used the falsified documents and misrepresentations from Mr. Martin to issue a document marked terminal contract to Lamb-Bowman that contained as a term and

condition of Lamb-Bowman's employment that: "If during the course of the next year, you show significant improvements in the areas cited, I may reconsider the terminal contract provision." President DeLauder later informed Lamb-Bowman he was not aware that she had a terminal contract. After Lamb-Bowman requested additional resources and equipment to perform her employment duties as Senior Women's Administrator and Head Women's Basketball Coach, DSU engaged in continuing discrimination and retaliation against Lamb-Bowman. On or about May 31, 1995, Lamb-Bowman was given the official position of DSU notifying her that she was being removed as Head Coach of Women's Basketball effective June 30, 1995. Lamb-Bowman was also notified of DSU's official position that her employment with DSU would be terminated effective August 31, 1995. Lamb-Bowman filed a timely charge with EEOC on or about November 22, 1995. During Lamb-Bowman's entire employment with DSU, the University maintained a continuing practice, policy and custom

of unlawfully discriminating against the women employees and women athletes in the Athletics Department at DSU. In addition, DSU has continuously operated its athletic program in an unlawful discriminatory manner. For example, DSU refused to fund its women's athletic program equal to its men's athletic programs. In addition, DSU expected its women basketball coach to perform in two positions in order to be paid the salary that its male basketball coach was paid for one position. In addition, DSU discriminatorily required its women's athletic programs to operate without equal coaching and support staff as was provided to its men's athletic programs. DSU intentionally maintained an environment that was intentionally discriminatory toward women coaches and women athletes. Lamb-Bowman was terminated in a manner that was discriminatory based on her gender.

Moreover, there is a major dispute involved in this case concerning DSU's falsification of Lamb-Bowman's personnel records in order to create a pretext for termination of her

employment because of her protected activities as set forth in the Complaint at paragraphs 21-23 of the Complaint. Here, Lamb-Bowman has proved that the manner in which she and other women employees were terminated differed discriminatorily from the manner in which DSU treated and terminated its men employees in the athletic department.

REASONS FOR GRANTING THE WRIT

1. The Third Circuit Decision Below Conflicts With Decisions Of Other Courts Of Appeals As To The Proper Relationship And Interpretation of Title VII Of The Civil Rights Act of 1964, 42 U.S.C. § 2000e And Title IX Of The Educational Amendments Of 1972, 20 U.S.C. § 1681

While phrased differently, the language of both Title VII and Title IX makes clear that both statutes protect individuals from employment discrimination on the basis of sex. See, Lakoski v. James, 66 F.3d 751(5th Cir.1995)("Any difference between their prohibitions of sex discrimination is not compelled by statutory language"). In addition, the "legislative history of the Educational Amendment of 1972 also suggests that the Title

IX right to be free from sex discrimination in employment is no different from the Title VII rights." Lakoski v. James,66 F.3d at 756 ("The House report's reference to Title VII suggests that, in enacting Title IX, Congress chose two remedies for the same right, not two rights addressing the same problem." Lakoski v. James,66 F.3d at 757.

Furthermore, federal "[a]dministrative regulations suggest that Title IX's proscription of sex discrimination, when applied in the employment context, does not differ from Title VII's." Lakoski v. James,66 F.3d at 757. Moreover, other federal circuit courts, besides the Fifth Circuit, that have addressed this issue have acknowledged that the prohibitions of sex discrimination under Title IX and Title VII are the same. See, Lipsett v. University of Puerto Rico, 864 F.2d 881,897(1st Cir.1988); Preston v. Commonwealth of Va, 31 F.3d 203,206(4th Cir.1994); Roberts v. Colorado State Bd. Of Agric., 998 F.2d 824, 832 (10th Cir.), cert. denied, 510 U.S. 1004 (1993), etc.

Here, to the contrary, in the rulings below, the Third Circuit and the District Court have misapprehended the nature and extent of the prohibitions against sex discrimination provided by Title VII and its relationship with Title IX. For example, the Third Circuit and the District Court below erroneously thought that the rights and remedies Congress has provided under Title VII and Title IX are mutually exclusive. This is a significant error that departs drastically from the language, legislative history, federal administrative regulations and other federal circuit courts acknowledgment "that the prohibitions of discrimination on the basis of sex of Title IX and Title VII are the same." Lakoski v. James,66 F.3d at 757. The Third Circuit's mistaken approach and mis-application of Title VII are self-evident from the language and logic used in ruling on both Lamb-Bowman's discrimination and retaliation claims below.

2. **Third Circuit's Misapprehended The Scope of Title VII In Ruling on Lamb-Bowman's Sex Discrimination Claim**

The Third Circuit language is instructive in revealing its mistaken view of the true scope of Title VII:

> "While such allegations might be relevant to a Title IX claim, they do not satisfy the third element of a prima facie case of sex discrimination under Title VII. Therefore, Lamb-Bowman's sex discrimination claims fail."

Appendix at 29.

Contrary to the Third Circuit's ruling, Petitioner Lamb-Bowman satisfied the Title VII standard and demonstrated that (1) that Lamb-Bowman was a female employed as Head Coach of Women's Basketball and the Senior Women's Administrator in the athletic department at DSU; (2) that Lamb-Bowman as Head Women's Basketball coach was denied equal pay, funding, resources, support and access to the athletic facilities as was provided to the Head Men's Basketball coach at DSU; that DSU had placed falsified documents in her personnel files and that she was being terminated from her long-term employment as Head Women's Basketball coach and Senior Women's Administrator

by DSU because she had spoken-up for equal treatment for herself, women's students that she coached and on behalf of other women's athletic programs in the athletic department at DSU ; and (3) that this action to terminate her as Head Women's Basketball coach and Senior Women's Administrator by DSU was occurring under circumstances that created an inference of unlawful employment discrimination. Id. The lower federal courts misapprehended their role in this case and the Third Circuit's decision must be reviewed in order to maintain harmony among the decisions of this Court and other circuit courts' interpretations of this important federal statute, i.e., Title VII. See, Johnson v. Railway Express Agency, 421 U.S. 454, 459 (1975) (interpreting Title VII and other federal statutes.)

Here, the Third Circuit misapplied Title VII law and it was improper for the District Court to resolve the factual disputes presented by the evidence concerning DSU's motivation for terminating Lamb-Bowman as both Head Women's Basketball coach and Senior Women's Administrator. The

Supreme Court has repeatedly stated that the resolution of such material facts are a function for a jury and not a judge. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 249 (1986)("Credibility determinations, the weighing of the evidence, the drawing of legitimate inferences from the facts are jury functions, not those of a judge..."). Accord, Reeves v. Sanderson Plumbing Products, Inc., ___ U.S. ___,120 S. Ct. 2097,2110(2000). The District Court misapprehended the significance of Lamb-Bowman's roles as both Head Women's Basketball coach and Senior Women's Administrator as evidenced by the Court's statement that "plaintiff's allegations are centered around alleged funding and resource disparities between the women's and men's athletic program at DSU. Plaintiff has confused discrimination based on her sex with discrimination based on her association with women's athletics." Appendix at 17. Contrary to the District Court's finding, a reasonable jury could find that based on the evidence in the record that Lamb-Bowman, as Senior Women's Administrator

was more than "associated with women's athletics" at DSU, but was specifically empowered under NCAA's regulations and employed to advocate for gender equity for herself, other women and women's programs in the athletic programs at DSU. Thus, a reasonable jury could further conclude, based on the evidence, that Lamb-Bowman was being discriminated against because of her sex when she was not allowed to fully perform her job as Senior Women's Administrator and was forced to work under discriminatory terms and conditions of her employment as Head Women's Basketball coach at DSU.

Contrary to the lower federal court's rulings, DSU violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-3(a)(Title VII) by discriminating against Lamb-Bowman because of her sex and retaliating against her because of her protected activities.

Title VII of the Civil Rights Act of 1964 broadly prohibits discrimination in the terms and conditions of employment on the basis of sex. The issue before the Third

Circuit was whether Lamb-Bowman's allegations stated a claim under Title VII. Appendix at 28-29. See, 42 U.S.C. §2000e-2(a). In addition, the allegations state a retaliation claim under other unlawful employment practices of Title VII.

See, 42 U.S.C. §2000e-3(a).

Lamb-Bowman demonstrated that DSU was an employer within the meaning of Title VII. As the Head Coach of DSU's women's basketball program and as Senior Women Administrator, Petitioner was an employee of DSU. Thus, Petitioner as the highest ranking female employee in the athletic department of DSU, she was advocating, addressing and correcting deficiencies in the operations of the women's basketball program in particular, and the women's athletics program in general as part of the terms and conditions of her employment with DSU. Accordingly, DSU could not legitimately base an adverse employment decision on Petitioner's sex or the fact that she opposed employment practices in the operations of the women's basketball and

women's athletics program under her leadership as the Senior Women's Administrator. Contrary to the lower courts rulings, Lamb-Bowman had a contractual relationship with DSU as its Head Coach of Women's Basketball and Senior Women's Administrator that triggered the provisions of Title VII governing "terms, conditions, or privileges of employment." See, Hishon v. King & Spalding, 467 U.S. 69,74(1984). Title VII forbids DSU from discriminating against Lamb-Bowman on the basis of her sex or the fact that she has opposed unlawful employment practices in the terms, conditions or privileges" of her employment. See, Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). Thus, contrary to the lower federal courts' rulings, Lamb-Bowman had a right under Title VII to be considered for continued employment with DSU without being discriminated against because of her sex or because she had opposed an unlawful employment practice under Title VII. Id., quoting Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57(1986)("The phrase "terms, conditions, or privileges of

employment evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment", which includes requiring people to work in a discriminatorily hostile or abusive environment"). Harris, 510 U.S. at 21.

Contrary to the lower federal court rulings, Lamb-Bowman has sufficiently asserted a Title VII claim by showing all the circumstances in which DSU discriminated against her, including but not limited to the discriminatory terms and conditions that she was forced to work under as head women's basketball coach and Senior Women Administrator at DSU. See, Aman v. Cort Furniture Rental Corp., 85 F.3d 1074,1085(3rd Cir. 1996)(" As a preliminary matter, protesting what an employee believes in good faith to be a discriminatory practice is clearly protected conduct."). Id. In showing the unlawful discriminatory and retaliatory conduct and workplace maintained by DSU, Lamb-Bowman was not limited to showing

one factor of unlawful sex discrimination. Harris, 510 U.S. at 23.

Here Lamb-Bowman has proved that the manner in which she and other women employees were terminated differed discriminatorily from the manner in which DSU treated and terminated its men employees in the athletic department. Id.

3. **Third Circuit Misapprehended The Scope Of Title VII In Ruling on Lamb-Bowman's Retaliation Claim**

Again, the Third Circuit language is instructive:

> "The District Court found that Lamb-Bowman's retaliation claims potentially violated Title IX, but not Title VII, therefore barring hr claims under Title VII. Her Title IX claims were time-barred and thus dismissed. Once more, her allegations involve retaliation against her for her opposition to disparities between the women's and men's athletics programs at DSU. Again, we conclude that the District Court properly awarded summary judgment to DSU because such an adverse employment action would be potentially protected

> under Title IX and not Title VII."

Appendix at 30.

Contrary to the District Court's findings, Lamb-Bowman established a prima facie case of retaliation and sex discrimination in violation of Title VII upon demonstration of DSU's unlawful treatment and intent to discriminate and retaliate against her. See, United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 (1983) (Plaintiff may prove case by direct or circumstantial evidence). Establishing the elements of a prima facie case is not an inflexible formula, but will necessarily vary from case to case depending upon the underlying factual situation. McDonnell Douglas v. Green, supra at 802 n.13. The McDonnell Douglas paradigm teaches that it is simply plaintiff's task to demonstrate that similarly situated employees were not treated equally. Burdine, supra at 258. The prima facie case, once established, creates an inference of discrimination because it is presumed that "such

acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Id.

Here, Lamb-Bowman established a prima facie case and DSU did not rebut the inference of unlawful discrimination created by Lamb-Bowman's establishment of a prima facie case.

The lower federal courts' misapprehension in their rulings stems from a failure to recognize that while Title VII and Title IX are similar in prohibiting unlawful employment discrimination, Lamb-Bowman's Title VII's claim is separate and distinct from a claim that students would bring under Title IX. See, Lakoski v. James, 66 F.2d 751, 758 (5th Cir. 1995),cert. denied, 117 S.Ct. 357 (1996). There are no student-plaintiffs in this employment litigation and Lamb-Bowman's claims and evidence are centered on her employment as Head Coach of Women's Basketball and Senior Women's Administrator. Here, Lamb-Bowman has satisfied the well settled federal policies and prerequisites governing employment discrimination actions in a

federal court. McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973). Id. at 411.

As a result of engaging in protected activities, DSU unlawfully discriminated and retaliated against Lamb-Bowman by failing to evaluate her as promised and terminating her employment because of her sex and protected activities. See, Hishon v. King & Spalding, 467 U.S. at 74. One of the primary issues in this retaliation claim relates to Lamb-Bowman complaining about unlawful discrimination against her and the women athletes that she coached. Under Title VII, it is unlawful for an employer to retaliate against an employee who has opposed an employment practice that is prohibited by the statute. 42 U.S.C. § 2000e-3(a). See, Woodson v. Scott Paper Co., 109 F.3d 913, 919(3rd Cir. 1997). In order to establish a prima facie case of retaliation under Title VII, a plaintiff must prove by a preponderance of the evidence that (1) she was engaged in protected activity; (2) her employer took adverse employment action against her; and (3) a causal connection

existed between the protected activity and the adverse action. Here, Lamb-Bowman has satisfied the above requirements by showing:(1) that she was engaged in protected activities when she opposed the discriminatory work environment created by DSU for her as an employee and for the other women in the athletic department;(2) that her employer took adverse employment actions against her by, among other things, falsifying[2] her performance evaluation in order to give her a sham terminal contract, failing to consider her for continued employment as promised by President DeLauder and terminating her employment with DSU because of her sex and opposition to DSU's discriminatory treatment of women in its athletic program; and that there is a causal relationship between her

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[2]In Aviles v. Cornell Forge Company, 183 F.3d 7th Cir.1999), it was found that an employer's "false report" to the police concerning an employee could be construed as a retaliatory action. In Aviles, the court stated that:"the language of Title VII retaliation provision is broad enough to contemplate circumstance where employers might take actions that are not ostensibly employment related against a current employee in retaliation for that employee asserting Title VII rights." Id.

termination as Head Women's Basketball Coach and Senior Women Administrator at DSU. This material credibility dispute is a question for the jury. Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. at 2110.

Although DSU conceded this aspect of Lamb-Bowman's case by not addressing it in their motion for summary judgment, the District Court improperly granted summary judgment on all Title VII claims to DSU and the Third Circuit, in affirming, departed from its duty by failing to correct the District Court erroneous ruling. DSU had the burden of rebutting the presumption created by articulating and proving before a jury a legitimate non-discriminatory business reason for the actions taken against Lamb-Bowman. Nevertheless, the lower federal courts awarded judgment to DSU when DSU had not meet its burden in the case. Instead of addressing the Title VII aspect of this case based on the Court's law of the case, the lower federal courts erroneously adopted DSU's misapprehension that Lamb-Bowman's opposition to DSU's unlawful employment practices

were practices prohibited by Title IX and not Title VII. It is interesting to note that neither the lower federal courts nor DSU could find a single case on point for this novel and tenuous argument. This is significant here because Lamb-Bowman was the supervisor of the women student basketball athletes and Lamb-Bowman's performance was dependent upon the quality of the student athletes that she recruits, develops and retains in the women's basketball program. In addition, Lamb-Bowman traveled with, ate with and provided living accommodations for the women student athletes on road games. Lamb-Bowman's employment is the supervision of the women student athletes and managing the available resources for such women student athletes at DSU. Therefore, when Lamb-Bowman opposed discrimination against herself and the student athletes that she supervised, she is opposed what is to her discriminatory employment practices within the athletic department where the men's basketball coach was allowed greater resources and support from DSU based solely on the sex of the men's head

coach and the men student athletes that he supervised. Cf. Nelson v. Upsala College, 51 F.3d 383,387 (3rd Cir. 1995)("Therefore, for Title VII protections to apply, there should be some connection between the allegedly retaliatory conduct and an employment relationship. Although '[t]he connection with employment need not necessarily be direct, it does not further the purpose of Title VII to apply section 704 to conduct unrelated to an employment relationship"). Id. Here, Lamb-Bowman has demonstrated that her opposition to sex discrimination in the Athletic Department at DSU caused her to suffer employment impairment, i.e., falsified and lowered performance evaluation that was used as a pretext for placing her on a sham terminal contract with a promise of a future review to determine continued employment that was never performed so that she could be retaliatorily discharged for engaging in the protected activity in her employment with DSU. Nelson v. Upsala College, 51 F.3d at 387. See also, Charlton v. Paramus Board of Education, 25 F.3d 194, 201(3rd Cir.1994).

Here, Lamb-Bowman's employment situation is closer to the plaintiff in Woodson v. Scott Paper Co., 109 F.3d 913(3rd Cir. 1997). In the Woodson case, the employer conceded that Woodson satisfied two of the three components of the prima facie case for retaliation, namely, that he filed a charges with EEOC and that he was discharged after he engaged in such protected activity. Id. The issue for the court in Woodson was whether there was a causal link between the protected activity and the discharge. After looking at "the whole picture", the court determined that there was the requisite casual link between the discharge and the protected activity. Id. at 921. Here, the lower federal courts' rulings appear to hold that Title VII does not prohibit an employer from retaliating against an employee for protesting unlawful discriminatory practices made unlawful by other federal statutes, i.e., Title IX, Equal Pay Act, etc. The lower federal courts' rulings are erroneous because they are refusing to look at the whole picture or pattern of antagonism and sex discrimination against an employee in both

of her positions in the athletic department at DSU and the discriminatory treatment of the other women in the DSU's Athletic Department where Lamb-Bowman was employed as Senior Women Administrator and Head Women's Basketball Coach. The lower federal courts were erroneously led astray because they ignored or overlooked the causal link between Lamb-Bowman's opposition to unlawful sex discrimination and her discharge as Senior Women Administrator and Head Coach of Women's Basketball.

The lower federal courts' rulings would have a lay victim who is opposing unlawful sex discrimination to approach protected activity as a game of billiards or table pool where the victim must call out "Title VII" or "Title IX" while engaged in protected activity in educational employment settings in order to prevail in court.[3]

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[3]The reasoning relied upon by the lower federal courts in reaching their conclusion is peculiar because none of the authorities relied upon provide any support that Lamb-Bowman cannot maintain her Title VII action. The lower

In the light of the above compelling evidence that Lamb-

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federal courts have overlooked the well-settled approach enunciated by the Supreme Court of the United States when construing retaliation statutes designed to protect individual rights. Tennessee Coal, Iron & R.Co. v. Muscoda Local No.123, 321 U.S. 590(1944) and Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288,292-93(1960) are two cases construing the anti-retaliation provision of the Fair Labor Standards Act(FLSA). In the Tennessee Coal case, The Court stated that "[The FLSA is] remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil.... Those are rights that Congress has specifically legislated to protect. Such a statue must not be interpreted or applied in a narrow, grudging manner. Id. at 1003, as quoted in Lambert v. Ackerley, 180 F.3d 997(9th Cir. 1999). In the Mitchell case, the Court further stated: "For weighty practical and other reasons, Congress did not seek to secure compliance with proscribed standards through continuing detailed federal supervision or inspection of payrolls. Rather, it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied....[I]t needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard condition. Id. 292. as quoted in Lambert v. Ackerley, 180 F.3d at 1003.See also, Brock v. Richardson, 812 F.2d 121(3rd Cir. 1987)(interpreting anti-retaliation provision of FLSA). In addition, see, Passaic Valley Sewerage Commissioner v. United States Department of Labor, 992 F.2d 474(3rd Cir.1993)(interpreting anti-retaliation provision of the Clean water Act).

Bowman had been the victim of intentional sex discrimination by a federally assisted educational institution, and that Title IX prohibits the same employment practices proscribed by Title VII, the Third Circuit has made a drastic departure from the expected, accepted and usual judicial and supervisory role of a federal appellate court in correcting errors of law that create unnecessary conflicts with decisions of other federal circuits, when it ruled that Lamb-Bowman's "claims potentially violate Title IX, but not Title VII, therefore barring her claims under Title VII." Appendix 30.

The decisions below of the lower federal courts involve important and recurring problems concerning efforts of employees of federally assisted educational institutions to seek protection under federal statutes and obtain appropriate relief for unlawful employment discrimination and retaliation.

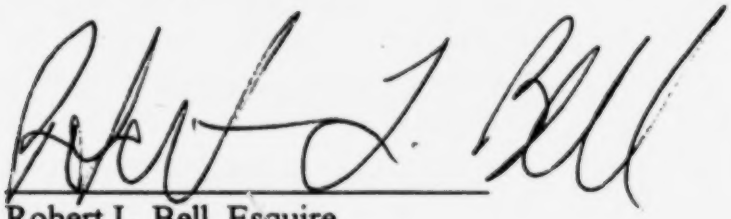
These problems and conflicts with other circuits justify the grant of certiorari to review the judgment below. The Third Circuit's and District Court's opinions in this case reflect

significant statutory and policy confusion and misapprehension of lower federal courts concerning the proper relationship and interpretation of Title VII and Title IX in an employment setting involving federally assisted educational institutions.

CONCLUSION

For these foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,



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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MARY LAMB-BOWMAN,	)	
	)	
Plaintiff,	)	Civ. A. No. 98-658-SLR
	)	
v.	)	
	)	
DELAWARE STATE UNIVERSITY, DR. WILLIAM B. DeLAUDER individually and in his official capacity as President; JOHN C. MARTIN, individually and in his official capacity as former Athletic Director; and WILLIAM COLLICK, individually and in his official capacity as Athletic Director,	)	
	)	
Defendants.	)	

Leonard L. Williams, Esquire of Wilmington, Delaware. Robert L. Bell, Esquire and C. Vaughn Adams, Esquire of Washington, D.C. Counsel for plaintiff.

Noel E. Primos, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware. Counsel for defendants.

Dated: March 27, 2001
Wilmington, Delaware

MEMORANDUM OPINION

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Mary Lamb-Bowman filed this action on November 24, 1998 against defendants Delaware State University ("DSU"), its President, Dr. William B. DeLauder ("DeLauder"), its former Athletic Director, John C. Martin ("Martin"), and its current Athletic Director, William Collick ("Collick"). Plaintiff alleges wrongful termination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e et seq., ("Title VII"), Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 ("Title IX"), 42 U.S.C. § 1983, and Delaware's public policy exception to the employment-at-will doctrine. By a December 10, 1999 order of Senior District Judge Murray M. Schwartz, the court dismissed plaintiff's Title IX, Section 1983 and state law claims

as time barred.[1] (D.I. 34) Currently before the court is defendants' motion for summary judgment on plaintiff's remaining Title VII claims.

II BACKGROUND

Beginning in 1985, DSU employed plaintiff as its head Women's Basketball Coach through a series of one-year contracts. During certain periods of her employment, plaintiff also served as Women's Volley ball Coach and Senior Women's Administrator in addition to her position as basketball coach. (D.I. 60 at B9-B11, B80) From 1985 to July 1994, defendant Martin was plaintiff's immediate supervisor. Sometime after July 1994 and prior to May 1995, defendant Collick became plaintiff's supervisor. Plaintiff's last day of employment at DSU was August 31, 1995. (D.I. 1)

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[1]The parties disagree as to whether, as a result of this order, defendants DeLauder, Martin and Collick remain liable in their official capacities. Because the court is granting summary judgment in favor of defendants,this issue is moot.

Plaintiff claims that since 1987 she had complained to Martin about disparities between the women's and men's athletic programs at DSU, and as a result of her complaints, she and the entire women's athletic program were discriminated and retaliated against by defendants. (D.I. 57 at A45) Specifically, plaintiff alleges that: 1) the athletic department's secretary would perform work for other coaches before performing work for plaintiff;[2] 2) equipment was not set up and floors were not swept when plaintiff wanted to conduct practices in the gymnasium, and plaintiff was not provided keys to the gymnasium and the weight room; 3) plaintiff was not allowed to perform certain functions as the Senior Women's Administrator;[3] and 4) a DSU peer committee that investigated

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[2]Although secretary Helen Scott was also a female member of the athletic department, plaintiff could not state whether she also suffered discrimination by defendants. (D.I. 57 at A69-A60)

[3]Plaintiff claims that she often asked Martin if she could arrange schedules for other sports and assist the other teams, but he refused. None of these requested was documents. (D.I. 57 at A36)

plaintiff's alleged NCAA violations reported false findings.[4] (D.I. 57 at A33-A36) Plaintiff created a "Comparison Table," a document that described the alleged disparities between the women's basketball program and the men's basketball program at DSU, as support for her claim that she had been discriminated against because of her sex. (D.I. 57 at A72-A78) Plaintiff also alleges that defendants made a "systematic effort" to fire all coaches of women's sports at DSU, including the male coaches.[5] (D.I. 57 at A42-A43)

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[4]Defendants investigated plaintiff's alleged noncompliance with certain NCAA rules regarding length and frequency of practices and scrimmages. In her deposition, plaintiff claimed that the committee's findings did not coincide with the testimony of the students whom the committee members interviewed. (D.I. 61 at B467-B470)

[5]In her deposition, plaintiff clearly stated her belief that the male coaches of women's sports were also discriminated against because of their association with the women's athletic program. (D.I. 57 at A71-A72)

On June 15, 1994, Martin sent defendant DeLauder a letter recommending that plaintiff's next one-year contract be a terminal contract:

> Coach Lamb-Bowman has not had a successful program as indicated in her inability to recruit and retain capable student-athletes who are sound athletically and academically; providing proper leadership in motivating students without undue confrontational situations; over religious emphasis; abiding by the spirit of the rules of the University and the NCAA, and providing a successful program in the win-loss category
>
> Coach Lamb-Bowman is always ready to challenge the rules, the support provided by the University and any shortcomings that have been pointed out to her. It is my firm belief that she will not change and will continue to challenge the support provided her as the reason for any lack of success of the women's program.

(D.I. 60 at B57)

In a letter dated July 6, 1994, defendant DeLauder informed plaintiff that her contract for the following school year

would be a terminal contract.[6] (D./I. 16 at A-1) Plaintiff signed the terminal contract on July14, 1994. (D.I. 16 at A-2)

On September 14, 1994, plaintiff wrote a letter to Martin in which she requested various items that she felt were needed to professionally manage the Women's Basketball Team, including computer and video equipment, and a designated facility to shower and change after home basketball games. (D.I. 18, Ex. 1)

On March 23, 1995, plaintiff met with DeLauder. (D.I. 18 at PA-2) In a letter dated April 13, 1995, plaintiff informed

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[6]The letter stated, in pertinent part:

> On the bases of the recommendations of Dr. Gladys Motley, Vice President for Student Affairs, and Mr. John Martin, Director of Athletics, you will be issued a terminal contract for the 1994-95 fiscal year. The reasons for this include poor academic performance of student athletes, a poor record of performance against both conference and non-conference opponents, difficulties in student-coach relations, and failure to strictly follow the spirit of NCAA regulations.
>
> If during the course of the net year, you show significant improvements in the areas cited, I may reconsider the terminal contract provision.
>
> (D.I. 16 at A-1)

DeLauder that she was experiencing "much emotional distress" since she learned that Martin "falsified [her] Employee Performance Appraisal.[7] (Id.) The letter further stated that plaintiff "was very relieved" when DeLauder stated during their March meeting that he was "not aware that [her] contract was a terminal contract; and that if a decision is made to terminate [plaintiff] from the university, [she would] receive a 90 day notice before such termination." (Id.) Plaintiff also expressed her view that more could be done for women's athletics at DSU if the women's athletic program was provided with resources equal to those provided to the men's program. (Id.)

On May 2, 1995, plaintiff received a letter from Collick asking her to resign.[8] (D.I. 18 at PA-3) The next day, plaintiff

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[7]Plaintiff alleges that Martin's evaluations of her performance declined after she complained to him about the disparities between the athletic programs. She also claims that Martin added the words, "Recommend a terminal contract" to her 1994 evaluation after she signed it. (D.I. 57 at A68)

[8]In a letter dated may 4, 1995, Collick wrote to DeLauder:
The areas of concern [over plaintiff's performance are]

wrote a letter to DeLauder stating that her termination was contrary to the agreement she had with him that she would receive 90 days notice before such termination. (Id.) The letter also stated that she felt that she was being forced to resign because of her opposition to discriminatory treatment of women athletes and coaches at DSU. (Id.)

In a letter dated May 31, 1995, DeLauder informed plaintiff that she would not be "reappointed" as Head Women's Basketball Coach.[9] (D.I. 16 at A-3) The letter further stated

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as follows: 1) poor academic performance of student-athletes, 2) a poor record of performance against both Conference and Non-Conference opponents, 3) difficulties in student-coach relations, and 4) failure to strictly follow the spirit of NCAA regulations.

It has come to my attention that there was not significant improvement in her Conference and Non-Conference records, there are currently numerous conflicts with regards to student-coach relations, and two sources at our University . . . did share similar findings with regard to NCAA violations . . . by Coach Lamb-Bowman during the alleged said times.

(D.I. 60 at B58)

[9]The letter states, in pertinent part:

On the bases of the recommendations of Dr. Gladys Motley, Vice President of Student Affairs, and Mr. William

that plaintiff's duties as Head Women's Basketball Coach would end on June 30, 1995, but her contract would extend through August 31, 1995 to provide her with a transitional period. During that time, she was to serve as a special assistant to the Director of Athletics.[10] (Id.) Plaintiff was replaced as Head Women's Basketball Coach by a woman, Jackie DeVane. (D.I. 60 at B8)

In her deposition, plaintiff described her experience of discrimination:

> I was personally discriminated against by Martin, by DeLauder, and by Collick, in that basically they were sexists. They were bigots.

> Collick, Director of Athletics, I regret to inform you that you will not be reappointed as Head Coach of Women's Basketball. Your duties as head Coach will end on June 30, 1995.
>
> This action is taken because you have not made significant improvements in the areas cited in my letter dated July 6, 1994 and it has been determined that you violated NCAA rules at least in two instances.

(D.I. 16 at A-3).

[10]This transitional period also functioned as the 90 days notice plaintiff was to receive prior to termination.

> They always told me to my face how great a job you are doing, good job, keep it up, way to go. And then they get behind my back or on paper, and they were putting these things together to fire me, all because they were sexists, all because I complained, wanting to make things right within the programs, wanting to make things right within not just my program, but in the women's programs in general.
>
> We wanted all of these things. We wanted, you know, to have people come to our games. We wanted TV coverage. We wanted all of these things that the men were getting. But we didn't get it, just because I complained. I did it myself, and then I was chewed up, regurgitated, and thrown to the dogs.

(D.I. 57 at A27-A28)

When asked how she was personally discriminated against because of her sex, plaintiff stated:

> How can you separate the two? The program is me. If I have the job, if I have the girls, if I wasn't at Delaware State, how can you separate them to say what actually happened to me as opposed to what happened to them? I am them. They are me.

(D.I. 57 at A35)

On November 22, 1995, plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging sex discrimination and retaliation in violation of Title

VII.[11] (D.I. 16 at A-4) The EEOC issued plaintiff a right to sue letter on August 26, 1998. (D.I. 18, Ex. 5)

On November 24, 1998, plaintiff filed a complaint in this court against DSU and DeLauder, Martin and Collick, individually and in their official capacities, alleging that they discriminated against her based on her sex and in retaliation for protected activity by terminating her employment.[12] Plaintiff

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[11]In an affidavit filed with the EEOC, plaintiff stated that after she complained about the athletic program disparities, Martin retaliated against her by falsely altering her 1993-94 performance evaluation after she had signed it. (D.I. 18, Ex. 4) Plaintiff further alleged that in May 1995 she was requested to resign because she had "continued to oppose and protest [defendants'] discriminatory administration of their intercollegiate athletic programs on the basis of the sex of their coaches and the sex of their student athletes." Plaintiff claimed that she was wrongfully removed as Head Women's Basketball Coach on June 30, 1995 and her employment with DSU was wrongfully terminated on August 31, 1995 because of her sex and protected activities in opposing sex-based discrimination by DSU against her and against women in the athletic department. (Id.)

[12]Plaintiff specifically contends that Martin, who was responsible for her evaluations through 1994, lowered his evaluations of her after she complained to him in 1993 about the inadequacy of scholarships and other sources of funding provided to the women's basketball program. Martin also allegedly falsified her 1993-94 performance evaluation after she had signed it. Plaintiff further

also claims that DSU discriminated against women athletes in violation of Title IX by failing to provide adequate or equal funding, facilities, equipment and other forms of support for the women's athletic program as compared to the men's program. (D.I. 1)

III STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n. 10 (1986). "Facts that could alter the outcome are 'material,' and

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alleges that DSU discriminated against her and other female members of the athletic department in terms of assignments and compensation, and that as a result of her requests for equal funding, defendants retaliated by diverting funds allocated to women's athletics to other programs. (D.I. 1)

disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See , Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient

showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See, Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). With respect to summary judgment in discrimination cases, the court's role is "to determine whether, upon reviewing all the facts and inferences to be drawn therefrom in the light most favorable to the plaintiff, there exists sufficient evidence to create a genuine issue of material fact as to whether the employer intentionally discriminated against the plaintiff." Revis v. Slocomb Indus., 814 F. Supp. 1209, 1215 (D. Del. 1993) (quoting Hankins v. Temple Univ., 829 F.2d 437, 440 (3d Cir. 1987)).

IV DISCUSSION

Claims brought pursuant to Title VII are analyzed under a burden-shifting framework. If plaintiff make a prima facie showing of discrimination or retaliation, the burden shifts to defendants to establish a legitimate, nondiscriminatory reason for their actions. See McDonnell Douglas Corp. v. Green, 411

U.S. 792, 802 (1973). If defendants carry this burden, the presumption of discrimination drops from the case, and plaintiff must "cast sufficient doubt" upon defendants' proffered reasons to permit a reasonable factfinder to conclude that the reasons are fabricated. Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1072 (3d Cir. 1996) (en banc). In the case at bar, the court need not engage in an extensive burden shifting analysis because plaintiff has not presented facts sufficient to state a prima facie case on her Title VII claims.

A. Title VII Discrimination Claim[13]

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[13]The anti-discrimination provision of Title VII provides: It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
42 U.S.C. § 2000e-2(a).

In order to state a prima facie case of Title VII discrimination, plaintiff must show: (1) that she is a member of a protected class; (2) that she suffered some form of adverse employment action; and (3) that this action occurred under circumstances that give rise to an inference of unlawful discrimination such as might occur when a similarly situated person not of the protected class is treated differently. See Boykins v. Lucent Techs., Inc., 78 F. Supp.2d 402, 409 (E.D. Pa. 2000) (citing Jones v. Sch. Dist. of Phila., 198 F.3d 403, 410 (3d Cir. 1999)).

In this case, plaintiff has failed to demonstrate that she suffered discrimination because of her sex. Rather, plaintiff's allegations are centered around alleged funding and resource disparities between the women's and men's athletic programs at DSU. Plaintiff has confused discrimination based on her sex with discrimination based on her association with women's athletics. Central to this conclusion is plaintiff's allegation that male coaches of women's sports at DSU were also treated

unfairly. Plaintiff was also replaced as head Women's Basketball Coach by a woman, further undermining her claim of sex discrimination. Plaintiff does allege adverse employment actions taken specifically against her and not other coaches (she could not perform functions as the Senior Women's Administrator, a peer committee erroneously concluded she committed NCAA violations), but plaintiff has not demonstrated that defendants' motivations in these instances were based on plaintiff's gender as opposed to retaliation for her complaints about the women's athletic program. Based on the record presented, the court concludes that plaintiff has failed to carry her burden of proving a prima facie case on her sex discrimination claim.[14]

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[14]The court also rejects plaintiff's argument that addressing and correcting deficiencies in the women's athletic program were part of the "terms and conditions" of her employment and, therefore, triggered the anti-discrimination provision of Title VII. On the contrary, the statute forbids an employer to discriminate against an individual with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a) (emphasis added). Plaintiff was not

B. Title VII Retaliation Claim

The anti-retaliation section of Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3a.

To establish a prima facie case of retaliation under Title VII, plaintiff must show: (1) that she engaged in a protected activity; (2) that defendants took adverse employment action agaisnt her; and (3) that a causal link exists between the protected activity and the adverse action. See Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1999). In the present case, defendants contend that plaintiff did not

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discriminated against because of her sex. Rather, plaintiff claims that she suffered discrimination based on the sex of her students, which is not prohibited by Title VII.

engage in a "protected activity" because she did not oppose "any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added). In other words, plaintiff did not oppose actions by defendants that allegedly violated Title VII. Rather, plaintiff opposed disparities between the women's and men's athletic programs at DSU - an activity that is protected by Title IX.[15]

The court agrees with this plain reading of the statutory language of Title VII. Moreover, although the Third Circuit has not spoken precisely to this issue, there exists case law to suggest that opposition to an alleged violation of Title IX is insufficient to establish a Title VII retaliation claim. In Barber v. CSX Distribution Servs., 68 F.3d 694 (3d Cir. 1995), the Third Circuit determined that an employee's letter to his

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[15]Title IX provides, in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

employer's human resources department was too vague to support a finding that his job was eliminated because he engaged in behavior that was protected under the Age Discrimination in Employment Act ("ADEA"). The court determined that the language of the ADEA means that a person has engaged in "protected conduct" when he "has opposed any practice made unlawful by . . . section [623 of the ADEA."[16]

> Thus, the statute provides that a person has engaged in "protected conduct" when s/he opposed discrimination on the basis of age. It is clear from Barber's letter that he felt that he had been treated unfairly as he stated that "the position was awarded to a less qualified individual." However, that letter does not explicitly or implicitly allege that age was the reason for the alleged unfairness. A general complaint of unfair treatment

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[16]The ADEA states, in pertinent part:

> It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment . . . because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d) (emphasis added).

> does not translate into a charge of illegal age discrimination.

Id. at 701-02 (emphasis in original). The similarity between the statutory language of the ADEA and that of the anti-retaliation provision of Title VII indicates that a Title VII retaliation claim must be premised on opposition to a violation of Title VII. See also, Lowrey v. Texas A&M Univ. Sys., 117 F.3d 242, 249 (5th Cir. 1997) ("[T]he anti-retaliation provision of titles VII and IX are not identical, and title VII provides no remedy for retaliation against individuals who raise charges of noncompliance with the substantive provisions of title IX. Title VII prohibits retaliation only against individuals who oppose discriminatory employment practices or participate in complaints or investigations of employment practices prohibited by title VII. By its plain language, therefore, title VII does not prohibit retaliation against complainants who challenge the misallocation of resources in violation of title IX, as such complaints are wholly

unrelated to the discriminatory employment practices proscribed by title VII.") (emphasis in original).

In the case at bar, plaintiff has alleged retaliation by defendants because she complained of disparities between the women's and men's athletic programs, a potential violation of Title IX. Plaintiff has not demonstrated that she suffered retaliation because she complained of discrimination based on her sex. Because plaintiff did not oppose a discriminatory action that is proscribed by the statute, plaintiff has failed to state a claim of retaliation under Title VII.[17]

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[17]Plaintiff also argues that she sufficiently stated a claim of Title VII retaliation because she protested what she believed to be a discriminatory practice. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1085 (3d Cir. 1996) ("[A] plaintiff need not prove the merits of the underlying [Title VII] discrimination complaint, but only that he was acting under a good faith, reasonable belief that a violation existed.") (quotations omitted). However, courts applying this standard have stated that the "discriminatory practice" must be an employment practice, in accordance with the purpose of Title VII. See, e.g., Kania v. Archdiocese of Phila., 14 F. Supp.2d 730, 736-37 (E.D. Pa. 1998) ("it is well-settled that a plaintiff in a retaliatory discharge claim need only prove that, at the time she opposed it, she reasonably believed that the challenged employment practice was unlawful."). See also, Nelson v. Upsala College, 51 F.3d 383, 388 (3d Cir. 1995) ("Our holding is consistent with the

V. CONCLUSION

For the reasons stated, defendants' motion for summary judgment is granted. An appropriate order shall issue.

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language of section 704 [of Title VII] as that section interdicts 'an unlawful employment practice' rather than conduct in general which the . . . employee finds objectionable. The words 'employment practice' suggest that the retaliatory conduct must relate to an employment relationship."). Plaintiff opposed what she believed to be discrimination suffered by her female students. Plaintiff has not alleged that any students were discharged from employment, not chosen for employment, or otherwise denied any privilege of employment by DSU. Therefore, plaintiff cannot have held a "reasonable belief" that she protested an unlawful employment practice. Advocacy of students' rights is simply not prohibited by Title VII.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MARY LAMB-BOWMAN,	)	
	)	
Plaintiff,	)	Civ. A. No. 98-658-SLR
	)	
v.	)	
	)	
DELAWARE STATE UNIVERSITY, DR. WILLIAM B. DeLAUDER individually and in his official capacity as President; JOHN C. MARTIN, individually and in his official capacity as former Athletic Director; and WILLIAM COLLICK, individually and in his official capacity as Athletic Director,	)	
	)	
Defendants.	)	

ORDER

At Wilmington, this 27th date of March, 2001

IT IS ORDERED that defendants' motion for summary judgment (D.I. 55) is granted. The Clerk of Court is directed to enter judgment in favor of defendants and against plaintiff.

/s/
United States District Judge

APPENDIX C

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2045

MARY LAMB-BOWMAN,

Appellant

v.

DELAWARE STATE UNIVERSITY;
DR. WILLIAM B. DELAUDER, individually
and in his official capacity as President;
JOHN C. MARTIN, individually and in his
official capacity as Former Athletic
Director; WILLIAM COLLICK, individually
and in his official capacity as Athletic
Director

Appeal from the United States District Court
for the District of Delaware
(D.C. Vil Action No. 98-cv-00658)
District Judge: Honorable Sue L. Robinson

Submitted Under Third Circuit LAR 34.1(a)
February 28, 2002

Before: ROTH and FUENTES, Circuit Judges
KATZ*, District Judge

(Opinion filed June 28, 2002)

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*Honorable Marvin Katz, District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION

ROTH, Circuit Judge:

Mary Lamb-Bowman appeals a final order of the United States District Court for the District of Delaware granting Delaware State University's motion for summary judgment. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1343(3) and (4) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over a grant of a motion for summary judgment. *See Metro Transp. Co. v. North Star Reinsurance Co.*, 912 F.2d 672, 678 (3d Cir. 1990). In our review of the grant of summary judgment, we view all reasonable inferences in a light most favorable to the nonmoving party. *Hamilton v. Leavy*, 117 F.3d 742, 746 (3d Cir. 1997). Summary judgment may be granted where there exists no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c).

Lamb-Bowman raises two issues for appeal: (1) that the District Court erred in denying her sex discrimination claims under Title VII of 42 U.S.C. § 1983, and (2) that the District Court erred in denying her retaliation claims under Title VII of 42 U.S.C. § 1983. For the reasons below, we will affirm the judgment of the District Court.

The first issue is whether the District Court erroneously found that Lamb-Bowman did not have a sex discrimination claim under Title VII of U.S.C. § 2000-e(a)(1). To have a prima facie claim of Title VII discrimination, a plaintiff must show: (1) that she is a member of a protected class, (2) that she suffered some form of adverse employment action, and (3) that this action occurred under circumstance that give rise to an inference of unlawful discrimination such as might occur when a similarly situated person not of the protected class is treated differently. *Boykins v. Lucent Technologies, Inc.*, 78 F.Supp. 2d 402, 409 (E.D. Pa. 2000) (citing *Jones v. School Dist. Of Philadelphia,* 198 F.3d 403, 410 (3d Cir. 1999)).

The District Court found that Lamb-Bowman did not establish a prima facie case of sex discrimination under Title VII. She did not demonstrate that she suffered discrimination based on her sex. Her allegations of sex discrimination were based, by her own account, on her opposition to DSU's funding and resource disparities between the women's and men's athletics programs and to DSU's discrimination toward all persons associated with women's athletics. These allegations fail to establish that she was discriminated against because of her sex. Although Lamb-Bowman alleges that she was subjected to adverse employment actions, these actions were aimed at persons involved in women's athletics; those persons included men. While such allegations might be relevant to a Title IX claim, they do not satisfy the third element of a prima facie case of sex discrimination under Title VII. Therefore, Lamb-Bowman's sex discrimination claims fail.

The second issue is whether the District Court erroneously found that Lamb-Bowman did not have a retaliation

claim under Title VII of 42 U.S.C. § 2000-e(3). To have a prima facie claim of Title VII discrimination, a plaintiff must show: (1) that she engaged in a protected activity, (2) that the defendants took adverse employment action against her, and (3) that there is a causal link between the protected activity and the adverse action. *Kachmar v. Sunguard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1999).

The District Court found that Lamb-Bowman's retaliation claims potentially violate Title IX, but not Title VII, therefore barring her claims under Title VII. Her Title IX claims were time-barred and thus dismissed. Once more, her allegations involve retaliation against her for her opposition to disparities between the women's and men's athletic programs at DSU. Again, we conclude that the District Court properly awarded summary judgment to DSU because such an adverse employment action would be potentially protected under Title IX and not Title VII.

For the foregoing reasons, we will affirm the judgment of the District Court.

TO THE CLERK:

Please file the foregoing Opinion.

By the Court,

/s/ Jane R. Roth
Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2045

MARY LAMB-BOWMAN,

Appellant

v.

DELAWARE STATE UNIVERSITY;
DR. WILLIAM B. DELAUDER, individually
and in his official capacity as President;
JOHN C. MARTIN, individually and in his
official capacity as Former Athletic
Director; WILLIAM COLLICK, individually
and in his official capacity as Athletic
Director

Appeal from the United States District Court
for the District of Delaware
(D.C. Vil Action No. 98-cv-00658)
District Judge: Honorable Sue L. Robinson

Submitted Under Third Circuit LAR 34.1(a)
February 28, 2002

Before: ROTH and FUENTES, Circuit Judges
KATZ*, District Judge

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*Honorable Marvin Katz, District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This case came on to be heard on the record before the United States District Court for the District of Delaware and was submitted pursuant to Third Circuit LAR 34.1(a) on February 28, 2002;

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated March 27, 2001, be and the same is hereby affirmed.

Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/
Chief Deputy Clerk

Dated: June 28, 2002

SUPREME COURT, U.S.
FILED
OCT 30 2002
OFFICE OF THE CLERK

No. 02-501

IN THE

Supreme Court of the United States

MARY LAMB-BOWMAN,

Petitioner,

v.

DELAWARE STATE UNIVERSITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

NOEL E. PRIMOS
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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Counter-Statement of the Case	1
A. Counter-Statement Of The Nature And Stage Of The Proceedings	1
B. Counter-Statement Of Facts	2
Reasons for Denying the Petition	3
I. Neither The Record Nor The Decision Below Raise The Question Presented By The Petition.	3
II. The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeals.	4
III. The Court Below Properly Determined That Petitioner Did Not Make Out A Prima Facie Case Of Sex Discrimination Under Title VII.	6
IV. The Court Below Properly Determined That Petitioner Did Not Make Out A Prima Facie Case Of Retaliation Under Title VII.	7
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

Barber v. CSX Distrib. Serv., 68 F.3d 694 (3d Cir. 1995) 10

Boykins v. Lucent Technologies, Inc., 78 F. Supp. 2d 402 (E.D. Pa. 2000), *aff'd*, 2002 U.S. App. LEXIS 4883 6

Crowley v. Prince George's County, 890 F.2d 683 (4th Cir. 1989) 10

Jackson v. Birmingham Board of Education, 2002 U.S. App. LEXIS 22001 (11th Cir.) 5

Jones v. School Dist. of Philadelphia, 198 F.3d 403 (3d Cir. 1999) 6

Kachmar v. Sunguard Data Sys., Inc., 109 F.3d 173 (3d Cir. 1999) 7

Lakoski v. James, 66 F.3d 751 (5th Cir. 1995), *cert. denied*, 519 U.S. 947 (1996) 4

Lowrey v. Texas A&M University System, 117 F.3d 242 (5th Cir. 1997) 5

Preston v. Commonwealth of Virginia ex rel. New River Community College, 31 F.3d 203 (4th Cir. 1994) 4-5

Cited Authorities

Page

Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061 (3d Cir. 1996), *cert denied*, 521 U.S. 1129 (1997) 1

Statutes:

20 U.S.C. § 1681 .....1, 3, 4, 5, 10

42 U.S.C. § 1983 1

42 U.S.C. § 2000e, *et seq.* ..... *passim*

42 U.S.C. § 2000e-2(a)(1) 3

42 U.S.C. § 2000e-3(a) 8, 10

COUNTER-STATEMENT OF THE CASE

A. Counter-Statement Of The Nature And Stage Of The Proceedings

Petitioner Mary Lamb-Bowman (hereinafter "Petitioner") filed a Complaint in the United States District Court for the District of Delaware on November 24, 1998, against Respondent Delaware State University (hereinafter "Respondent") and individual Defendants Dr. William B. DeLauder, John C. Martin and William Collick, asserting various claims under federal and state law in connection with the non-renewal of her employment contract by Respondent. Specifically, Petitioner alleged violations of 42 U.S.C. § 1983, Title VII (42 U.S.C. § 2000e, *et seq.*), and Title IX (20 U.S.C. § 1681), and Petitioner alleged that Respondent's actions constituted wrongful discharge in violation of public policy.

On May 28, 1999, Respondent and the individual Defendants filed a motion for summary judgment on the basis that Petitioner's claims were time-barred. On December 10, 1999, the Court denied summary judgment on this basis with respect to Petitioner's Title VII claims, but granted summary judgment with regard to all of Petitioner's other claims, including her claims under Title IX.[1]

On April 20, 2000, Respondent filed a motion seeking summary judgment on all of Petitioner's remaining claims, namely, her Title VII sex discrimination claim and her Title VII

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1. It is Respondent's position that, with this decision, the Court effectively disposed of all claims against the individual Defendants, since individual employees may not be held liable under Title VII. *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1077 (3d Cir. 1996), *cert denied*, 521 U.S. 1129 (1997).

retaliation claim.[2] On March 27, 2001, the District Court granted Respondent's motion, thus entering summary judgment in favor of Respondent on all of Petitioner's remaining claims. On June 28, 2002, the United States Court of Appeals for the Third Circuit affirmed.

B. Counter-Statement Of Facts

Petitioner claims in her Petition that Respondent "maintained a continuing practice, policy and custom of unlawfully discriminating against the **women** employees and **women** athletes in the Athletics Department at DSU," and that Respondent "intentionally maintained an environment that was intentionally discriminatory toward **women** coaches and **women** athletes." Pet. at 6, 7 (emphasis supplied). However, this is contrary to what Petitioner stated during discovery.

Petitioner stated in her deposition that **all** persons associated with women's athletics at Delaware State University, whether male or female, **including male coaches of women's athletic teams**, were discriminated against because they were associated with women's athletics. Petitioner further stated in her deposition that she suffered discrimination because she complained about inequitable treatment of her athletic program and the women's athletic programs in general. Petitioner also testified that discrimination against her athletic program constituted discrimination against her because "[t]he program is me." Finally, Petitioner testified that a document entitled "Comparison Table," comparing alleged disparities between

2. Thus, Petitioner's statement to the contrary in her Petition, *i.e.*, that Respondent sought summary judgment only on Petitioner's retaliation claim, is incorrect.

the women's basketball program and the men's basketball program at Delaware State University, supported her claim that she had been discriminated against because of her sex.

Petitioner was replaced as head women's basketball coach by another woman, Jackie Devane.

REASONS FOR DENYING THE PETITION

I. Neither The Record Nor The Decision Below Raise The Question Presented By The Petition.

According to Petitioner, the question presented by the petition is whether an employee whose discrimination claims are relevant and actionable under Title IX, but who has also met the requirements of Title VII, may proceed exclusively under Title VII. However, as the court below found, Petitioner has not met the requirements of Title VII, because she has failed to present a prima facie case of either sex discrimination or retaliation under Title VII. Thus, Petitioner's claims are **not** actionable under both Title VII and Title IX. Rather, they are actionable, if at all, only under Title IX.

Title VII, in pertinent part, prohibits, as an unlawful employment practice, discrimination against an individual "with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . ." 42 U.S.C. § 2000e-2(a)(1). As Petitioner asserted in discovery, however, she is claiming that Respondent discriminated against her because of her association with women's athletics, not because of her sex. As the record further demonstrates, Petitioner is claiming that she suffered retaliation not because she complained about discrimination

against female employees, but because she complained about discrimination against women's athletic programs — discrimination that, according to Petitioner, affected male employees (*i.e.*, male coaches of women's athletic teams) just as it did female employees.

It is undisputed that Petitioner's Title IX claims were dismissed by the District Court in December 1999 as untimely filed. [3] Thus, the only issue before the Court below is whether Petitioner has stated a prima facie claim under Title VII — *i.e.*, either a sex discrimination claim or a Title VII retaliation claim. Petitioner has not done so because the record shows that she is claiming discrimination and retaliation not because of her sex, but because of her association with women's athletic programs.

II. The Decision Below Does Not Conflict With Decisions Of Other Courts Of Appeals.

Both the District Court and the Court of Appeals below held that Petitioner had not made out a prima facie claim under Title VII because her claims of discrimination were based upon her association with women's athletic programs, not upon her sex. Petitioner has failed to cite any decision of a court of appeals, or indeed any authority, holding that such a claim is actionable under Title VII. Thus, the existence of circuit "splits" on such issues as whether a private right of action exists for money damages for gender-based employment discrimination under Title IX, *see, e.g.*, *Lakoski v. James*, 66 F.3d 751 (5th Cir. 1995), *cert. denied*, 519 U.S. 947 (1996) (there is no private cause of action for employment discrimination under Title IX) *and Preston v.*

3. Petitioner has never appealed the District Court's grant of summary judgment on her Title IX claims.

Commonwealth of Virginia ex rel. New River Community College, 31 F.3d 203, 205-06 (4th Cir. 1994) (recognizing private right of action under Title IX for employment discrimination), or whether a private right of action exists for retaliation under Title IX, *see, e.g.*, *Lowrey v. Texas A&M University System*, 117 F.3d 242, 249 (5th Cir. 1997) (Title IX provides private right of action for retaliation) *and Jackson v. Birmingham Board of Education*, 2002 U.S. App. LEXIS 22001 (11th Cir.) (Title IX does not provide private action for retaliation), are irrelevant to this case and to the decision of the court below.[4]

Neither the Court of Appeals nor the District Court in this case held, as claimed by Petitioner, that the rights and remedies under Title VII and Title IX are mutually exclusive. Rather, both courts held only that certain claims that may be actionable under Title IX — *i.e.*, claims that an employee has suffered discrimination because of her association with women's athletics or because of her complaints about the treatment of women's athletic programs — are not actionable under Title VII, because Title VII prohibits discrimination based upon sex and upon complaints of sex discrimination in employment, not discrimination and retaliation based upon association with women's athletic programs.

In summary, Petitioner's claim that the decision of the court below is in conflict with decisions of other courts of appeals is erroneous and is an attempt by Petitioner to gain access to this Court when there is no warrant for her to do so under the rules and precedents of this Court.

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4. Indeed, the United States Court of Appeals for the Third Circuit has not ruled on either of the above issues, and the decision of the court below did not take a position on either issue.

III. The Court Below Properly Determined That Petitioner Did Not Make Out A Prima Facie Case Of Sex Discrimination Under Title VII.

As the court below properly stated, in order to state a prima facie case of sex discrimination under Title VII, a Plaintiff must show (1) that she is a member of a protected class; (2) that she suffered an adverse employment action; and (3) that this action occurred under circumstances giving rise to an inference of unlawful discrimination, such as might occur when a similarly situated individual not of the protected class is treated differently. Pet., App. 28 (citing *Boykins v. Lucent Technologies, Inc.*, 78 F. Supp. 2d 402, 409 (E.D. Pa. 2000), *aff'd*, 2002 U.S. App. LEXIS 4883 (citing *Jones v. School Dist. of Philadelphia*, 198 F.3d 403, 410 (3d Cir. 1999))). The court below correctly found that, because Petitioner's claims of sex discrimination "were based, by her own account, on her opposition to DSU's funding and resource disparities between the women's and men's athletic programs and to DSU's discrimination toward all persons associated with women's athletics," she could not satisfy the third prong of a prima facie claim. Pet., App. 29.

Petitioner claims in her Petition that she "has proved that the manner in which she and other women employees were terminated differed discriminatorily from the manner in which DSU treated and terminated its men employees in the athletic department." Pet. at 18. This is not, however, what Petitioner herself declared in discovery. Specifically, Petitioner stated in her deposition that the discrimination that she allegedly experienced was directed at her not because she was a woman, but because she was associated with women's athletic programs.

As noted *supra*, Petitioner stated that not only were the women in the Athletic Department of Respondent discriminated against, but all persons associated with women's athletics, including male coaches of women's sports, were discriminated against because of their association with women's athletics. Thus, as the Court below properly held, Petitioner failed to satisfy the third prong of a prima facie Title VII claim because she failed to show the existence of circumstances that would give rise to an inference that she was discriminated against because of **her** gender rather than the gender of the student athletes that she coached.

IV. The Court Below Properly Determined That Petitioner Did Not Make Out A Prima Facie Case Of Retaliation Under Title VII.

The court below also stated the proper standard for stating a prima facie claim of retaliation under Title VII: a Plaintiff must show (1) that she engaged in a protected activity; (2) that she suffered an adverse employment action; and (3) that there is a causal link between the protected activity and the adverse action. Pet., App. 30 (citing *Kachmar v. Sunguard Data Sys., Inc.*, 109 F.3d 173, 177 (3d Cir. 1999). The problem for Petitioner, as both of the courts below recognized, is that she could not and cannot satisfy the first prong of this test because her purported protected activity is **not** protected under Title VII.

Title VII prohibits discrimination by an employer against an employee

> because he has opposed any practice made an unlawful employment practice by this subchapter,

> or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). Using the language of the statute, discrimination against an employee because of his or her sex has been "made an unlawful employment practice" by Title VII. However, neither discrimination in general against women's athletic programs, nor discrimination against an employee because of his or her association with women's athletic programs, has been "made an unlawful employment practice" by Title VII. The latter, however, are by Petitioner's own account what she complained of, and the source of retaliation against her.

Petitioner claims in her Petition that she "engaged in protected activities when she opposed the discriminatory work environment created by DSU for her as an employee and for the other women in the athletic department." Pet. at 22. However, it is evident from Petitioner's own testimony at her deposition that the discrimination that she observed and complained about was not discrimination against women employees in the Athletic Department because of their gender, but discrimination against students and employees, male and female, in the Athletic Department because of their association with women's athletic teams. According to Petitioner, male coaches of women's teams at Delaware State University suffered discrimination along with female coaches of such teams. Moreover, by Petitioner's own account, not all women employees in the University's Athletic Department suffered discrimination. Specifically, Petitioner testified that Helen Scott, the Athletic Department secretary, was one of the individuals who discriminated against Petitioner.

Petitioner made clear on the record that the alleged "protected activity" for which she was terminated was her complaining about disparities between the men's and women's athletic programs, and particularly the men's and women's basketball programs at the University. According to Petitioner, Athletic Director John Martin changed his treatment of Petitioner and improperly lowered her evaluation after she complained about the inadequacy of scholarships and funding provided the women's basketball program. Thus, by her own account, Petitioner suffered retaliation not because she complained about discrimination against female employees on the basis of their sex (which is prohibited by Title VII), but because she complained about discrimination against all persons associated with women's athletics at the University, including male coaches (which is not prohibited by Title VII). It was for this reason that the District Court and the Court of Appeals held that Petitioner's claims should be dismissed, *i.e.*, because her alleged "protected activity" is not "protected" by Title VII.

Petitioner has attempted to muddy the record in this case by claiming in her Petition that she opposed discrimination against women in the Athletic Department. However, when asked in her deposition to explain a statement in an interrogatory response that she had been removed as head women's basketball coach for opposing Respondent's discrimination against her and the women in the Athletic Department because of their sex, she testified that she was referring to discrimination by Respondent against the women's athletic programs, including male coaches of those programs, and **not** to discrimination against only women students and women coaches at the University.

Petitioner has claimed that she was terminated because she opposed alleged violations of Title IX at the University. Such a claim does not establish a retaliation claim under Title VII, because Title VII prohibits retaliatory conduct by an employer "because [an employee] has opposed any practice made an unlawful employment practice by this subchapter [*i.e.*, Title VII]. . . ." 42 U.S.C. § 2000e-3(a). Title VII does not prohibit an employer from retaliating against an employee for opposing practices made unlawful by other federal statutes (*i.e.*, statutes other than Title VII). *See Crowley v. Prince George's County*, 890 F.2d 683 (4th Cir. 1989) (Title VII did not prohibit retaliation against employee because he opposed racial harassment against members of the community that did not constitute employment discrimination); *Barber v. CSX Distrib. Serv.*, 68 F.3d 694, 701-02 (3d Cir. 1995) (employee's claim that he suffered retaliation due to a general complaint of unfair treatment did not state a retaliation claim under the Age Discrimination in Employment Act).

In short, the practices of which Petitioner complained were not discriminatory under Title VII, because they did not involve discrimination against employees of Respondent on the basis of their gender. According to Petitioner, she was terminated for complaining about disparities between the men's and women's athletic programs, rather than about intentional discrimination against employees of Respondent because of their sex.

CONCLUSION

Petitioner has attempted, in her Petition to this Court, to obscure the issues that were before the court below. The court below determined, based upon the factual record before it, and specifically upon Petitioner's own statements in the record, that Petitioner had failed to state a prima facie claim under Title VII either for sex discrimination or for retaliation. Accordingly, for all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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